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No. 89-312

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT MEMORANDUM IN OPPOSITION OF RESPONDENTS CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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JOINT MEMORANDUM IN OPPOSITION OF RESPONDENTS CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

These respondents respectfully request that this Court deny the petition for a writ of certiorari filed herein on August 23, 1989, to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 10, 1989.*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 867 F.2d 654. The memorandum opinion and order of the Federal Communications Commission

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* A minority of the stock of CBS Inc. is owned by Loews Corporation, a publicly-owned corporation.

(Pet. App. 188a-281a) is reported at 2 F.C.C. Rcd 5043. The memorandum opinion and order of the Federal Communications Commission on reconsideration (Pet. App. 282a-306a) is reported at 3 F.C.C. Rcd 2035.

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a-74a) was entered on February 10, 1989. The orders of the court of appeals denying rehearing and rehearing en banc were entered on April 25, 1989 (Pet. App. 75a, 76a). By order dated May 15, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 23, 1989. The petition for a writ of certiorari was filed on August 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

I. THE CONSTITUTIONAL ISSUE WAS NOT DECIDED BY THE COURT OF APPEALS.

The primary thrust of the petition is to convince this Court to grant certiorari on an issue that was not decided by the court of appeals.[1]

At the agency level, the Federal Communications Commission ("Commission") did decide the constitutionality of the second part of the fairness doctrine which required the presentation of opposing views on controversial issues of public importance.[2] The Commission found that requirement to be unconstitutional because it served no substantial government interest[3] and had the effect of chilling speech.[4] The court of appeals affirmed the Com-

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[1] Pet. at 10.

[2] *Syracuse Peace Council*, 2 F.C.C. Rcd 794 (1987) (Pet. App. 190a, 245a-47a, 277a).

[3] Pet. App. 245a-46a.

[4] Pet. App. 246a-47a.

mission solely on the basis of the Commission's finding, as a policy matter, that the fairness doctrine no longer served the public interest.[5] This case thus presents no constitutional question for this Court's review.[6]

II. THE ISSUES DECIDED BY THE COURT OF APPEALS DO NOT WARRANT REVIEW BY THIS COURT.

The court of appeals decided that the Commission did not act arbitrarily in eliminating the second part of the fairness doctrine.[7] Petitioners do not contend that the court of appeals' decision upholding the Commission's elimination of the second part of the fairness doctrine conflicts with the decision of any other circuit or that it presents an important question of administrative law. Petitioners barely make an effort to show that this issue was incorrectly decided by the court of appeals,[8] and that issue does not warrant this Court's review.

The court of appeals also decided that the Commission did not act arbitrarily in eliminating the first part of the fairness doctrine.[9] That part of the doctrine required that broadcasters present views on controversial issues. Again, petitioners assert no conflict among the circuits and do not claim that the court of appeals has decided an important question of administrative law. In any event, this issue could not warrant review by this Court since the Commission has made clear in its decision below that the first part of the fairness doctrine is largely duplicative of a separate Commission requirement that requires the broadcast of issues-responsive programming, a re-

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[5] Pet. App. 8a, 32a.

[6] *Id.*

[7] Pet. App. 13a, 32a.

[8] Pet. at 14-15.

[9] Pet. App. 32a, 72a.

quirement that remains undisturbed by the decision below.[10]

The court of appeals also held that the fairness doctrine was not required by statute, basing its decision on a three-year old decision of the same court,[11] which found that the fairness doctrine had not been codified by statute and hence could be eliminated by the Commission.[12] This Court earlier denied certiorari to review that decision. Contrary to petitioners' contention,[13] the court of appeals' decision on this statutory issue does not conflict with the decision of any other circuit and, in fact, is consistent with the decision of the First Circuit in *Public Interest Research Group v. FCC.*[14]

Nor is the decision on the statutory question likely to be important in the future. Congress in recent years has devoted considerable attention to the question whether the fairness doctrine should be codified. Indeed, Congress in 1987 passed a bill to codify the doctrine, which was subsequently vetoed by the President.[15] As the petition itself recognizes, efforts to codify the doctrine—and opposition

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[10] Pet. App. 31a-32a, 224a n.101.

[11] *Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) ("TRAC").

[12] *Id.* at 517-18.

[13] Pet. at 15.

[14] 522 F.2d 1060, 1066-67 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). *Public Interest Research Group* is the only case other than *TRAC* in which a court has squarely ruled on the question of whether the fairness doctrine was required by Section 315(a) of the Communications Act. In *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984), cited by petitioners, the court of appeals was not presented with this question and made only a passing reference to the codification issue.

[15] Fairness in Broadcasting Act of 1987, S. 742, 100th Cong., 1st Sess. (1987).

to those efforts—continues.[16] Under such circumstances the statutory issue does not warrant this Court's review.

In any event, the codification question was correctly decided by the court below. When the Radio Act of 1927, the predecessor of the Communications Act of 1934, was enacted, it contained no fairness doctrine, and Congress had, in fact, rejected proposals to require the presentation of opposing views on public issues.[17] Although legislative efforts to mandate such a doctrine continued to be defeated,[18] the Federal Radio Commission, predecessor of the Federal Communications Commission, began, as early as 1929, to develop on case-by-case basis a concept of fairness in broadcasters' treatment of public issues.[19] The fairness doctrine was first articulated in its present form by the Commission in 1949 in its Report on Editorializing.[20] When Congress exempted news and news-related programs from the equal opportunities requirement of Section 315 of the Communications Act, it made reference in that legislation to the fairness doctrine, stating

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[21]

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[16] Pet. at 18 n.25, 22.

[17] *See* S. Rep. No. 772, 69th Cong., 1st Sess. (1926); 67 Cong. Rec. 5560 (1926).

[18] *See, e.g.*, H.R. Rep. No. 2106, 72nd Cong., 2d Sess. 4 (1933); S. Rep. No. 781, 73rd Cong., 2d Sess. 8 (1934); 78 Cong. Rec. 10988 (1934).

[19] *See, e.g., Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.) *cert. dismissed*, 281 U.S. 599 (1930).

[20] 13 F.C.C. 1246 (1949).

[21] 47 U.S.C. 315(a) (1982).

The language and legislative history of these 1959 amendments were interpreted by this Court of *Red Lion Broadcasting Co. v. FCC*.[22] There this Court rejected the contention that the fairness doctrine was not *authorized* by the public interest standard of the Communications Act:

> Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public isues . . . .[23]

At the same time the Court made plain that the 1959 amendments to Section 315 did not *require* the fairness doctrine. The Court found that the reference to the fairness doctrine in the 1959 amendments was an effort to "preserve" that administrative doctrine in the newly exempted areas: "Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts." [24] Specifically, the Court found that the defeated Proxmire amendment to the 1959 amendments, which would have "constituted a positive statement of the [fairness] doctrine," was altered "to the present *merely approving* language in the conference committee." [25]

The only other circuit expressly to consider this question, like the court below, has concluded that the "fairness doctrine is not a creature of statute." [26] In *Public Interest Research Group v. FCC*,[27] the First Circuit held that

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[22] 395 U.S. 367 (1969).

[23] *Red Lion*, 395 U.S. at 382.

[24] *Id.* at 385. Elsewhere the Court stated that Congress had "ratified" the Commission's efforts. *Id.* at 381.

[25] *Id.* at 383-84 (emphasis supplied).

[26] *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

[27] 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

the Commission acted within its statutory authority when it excluded from the fairness doctrine those product commercials which did not explicitly address a public issue.[28] In rejecting the argument that Congress had " 'codified' both the fairness doctrine and the Commission's former application of it to product ads," the Court adopted the view that Congress, in 1959, merely, "acknowledged and generally endorsed the Commission's adoption of fairness standards." [29]

The view that the 1959 amendments merely protected the Commission's doctrine from an implied repeal is strongly supported by the legislative history. During consideration of the 1959 amendments, both the Department of Justice and the Commission expressed concern that in exempting news programs from the statutory equal time requirements, Congress should not inadvertently suggest that the Commission's fairness doctrine would no longer apply to such broadcasts.[30] In response to these concerns, the Senate Committee stated in its report that it wished to make "crystal clear" that the amendment would not affect the Commission's existing policy.[31]

Senator Proxmire, however, was not content with this approach. During the floor debates on the Senate bill,

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[28] *Id.* at 1066-67.

[29] Id. at 1066.

[30] *Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 75, 309, & n.3 (1959); *Political Broadcasts—Equal Time: Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 13, 122 & n.6 (1959). There was no suggestion by either the Department or the Commission that Congress should act to codify the doctrine.

[31] S. Rep. No. 562, 86th Cong., 1st Sess. 13 (1959).

he sought to make the fairness doctrine a congressional requirement and offered a modification that provided that nothing in the 1959 amendments to Section 315 should be construed to change "the basic intent of Congress . . . which recognizes that . . . all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible" in all of the exempted categories of news programs.[32] With minor modifications, the Proxmire amendment was adopted and appeared in the final version of the Senate bill.[33]

The House substitute contained no provision comparable to the Proxmire amendment. Instead, the House bill, like the original Senate bill, simply exempted news programs from the equal time requirements of Section 315.[34] In conference, the Proxmire amendment was included in the final bill, but was modified to eliminate the statement ascribing the general fairness obligations to "the basic intent of Congress." Instead, as noted above, the final language referred to the fairness requirements as being "imposed . . . under" the Act. The conferees did not view themselves as enacting new statutory obligations, but rather intended to recognize the Commission's authority to enforce the fairness doctrine under the Act and to ensure that the exemptions to Section 315 were not read to abrogate that authority.[35] As this Court concluded in *Red*

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[32] 105 Cong. Rec. 14457 (1959).

[33] *Id.* at 14457, 14463.

[34] H.R. Rep. No. 802, 86th Cong. 1st Sess. 2 (1959).

[35] *See* H.R. Rep. No. 1069, 86th Cong., 1st Sess. 4-5 (1959), *reprinted at* 105 Cong. Rec. 17777 (1959) (emphasis supplied); *see also* 105 Cong. Rec. 17778 (1959).

This view of the scope of the 1959 amendments to Section 315 has been shared by a 1968 congressional staff study, *see Staff Study of the House Comm. on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine,* 90th Cong., 2d Sess. 29 (1968) (the "suggest[ion] that Congress, in its enactment of the 1959 amendments, intended neither approval nor disapproval of

Lion, the conferees modified the Proxmire Amendment from a "positive statement" to "merely approving language." [36]

Absent any clear expression of congressional intent to make the fairness doctrine a statutory requirement, it would be wholly inappropriate to view Congress as seeking inflexibly to codify Commission requirements such as the fairness doctrine when changing conditions may make modification or abandonment of the requirements appropriate—as has been the case with respect to the fairness doctrine.[37]

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the Fairness Doctrine, but intended to insure that Section 315 would not interfere with it . . . appears to be a more accurate reading of the legislative history than the alternative one that Congress intended a complete codification of the doctrine"), and by several commentators, *see, e.g.*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 134 (1967) (concluding that 1959 amendments preserve but did not require the fairness doctrine); Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperior's New Clothes*, 23 Fed. Comm. B.J. 75, 81-82 (1969) (same).

[36] *See supra* at p. 6.

[37] *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (Commission requires "the flexibiltiy to experiment with new ideas as changing conditions require"); *id.* at 118 (opinion of Burger, C.J.) (recognizing the importance of giving the Commission "flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing programs and needs"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) ("the public-interest standard of the Act [was designed to serve as] 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy' ") (citation omitted); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

CONCLUSION

For the foregoing reasons, the petition for certiora[illegible] should be denied.

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